

**ORAL ARGUMENT NOT YET SCHEDULED**

**NO. 15-1184 (CONSOLIDATED WITH CASE NO. 15-1242)**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**OZBURN-HESSEY LOGISTICS, LLC,  
PETITIONER/CROSS-RESPONDENT**

**v.**

**NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT/CROSS-PETITIONER,**

**AND**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING,  
ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION, INTERVENOR.**

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**PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF A  
DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**FINAL BRIEF OF INTERVENOR, UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1) of this Court, counsel for Intervenor United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“Union” or “USW”) certifies the following:

**A. Parties, Intervenors, and Amici:** The Union was the charging party before the National Labor Relations Board (“NLRB” or “Board”) and is the intervenor in this proceeding. Ozburn-Hessey Logistics, LLC (“Company”) was the respondent before the NLRB and is the petitioner/cross-respondent in this proceeding. The NLRB is the respondent/cross-petitioner in this Court. The Union moved to intervene on behalf of the Board on July 21, 2015 and the motion was granted on August 28, 2015. There are presently no amici curiae.

**B. Ruling Under Review:** The case is before the Court on a petition filed by the Company for review of an order issued by the Board on June 15, 2015, and reported at 362 NLRB No. 118.

**C. Related Cases:** The ruling under review has not previously been before this Court or any other court. A related case, *Ozburn-Hessey Logistics v. NLRB*, D.C. Cir. Case Nos. 14-1253 and 14-1289, has been fully briefed and is awaiting oral argument before this Court.

Dated: January 21, 2016

Respectfully submitted,

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**DISCLOSURE STATEMENT PURSUANT  
TO FRAP AND LOCAL RULE 26.1**

Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“Union” or “USW”) is a labor organization. The Union has no parent company, subsidiary or affiliate which has issued shares or debt securities to the public.

Dated: January 21, 2016

Respectfully submitted,

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**GLOSSARY**

2013 D&O	NLRB's Decision and Order issued on May 2, 2013
2014 D&O	NLRB's Decision and Order issued on November 17, 2014
2015 D&O	NLRB's Decision and Order issued on June 15, 2015
A.	Deferred Appendix
Act	National Labor Relations Act
ALJ	Administrative Law Judge Ringler
Board	National Labor Relations Board
Company	Petitioner Ozburn-Hessey Logistics, LLC
Co. Br.	Opening brief of Petitioner Ozburn-Hessey Logistics, LLC
NLRB	National Labor Relations Board
NLRB Br.	Brief for the National Labor Relations Board
Tr.	Transcript of the November 30, 2011, ALJ hearing
Union	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
USW	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

### **STATEMENT OF JURISDICTION**

The Union hereby incorporates and adopts the NLRB's Statement of Jurisdiction as if fully set forth herein. (NLRB Br. 1-3.)

### **STATEMENT OF THE ISSUES PRESENTED**

The Union hereby incorporates and adopts the NLRB's Statement of the Issues Presented as if fully set forth herein. (NLRB Br. 3.)

### **RELEVANT STATUTORY PROVISIONS**

All relevant statutory provisions are included in the addendum to the Company's brief.

### **STATEMENT OF THE CASE**

The Union hereby incorporates and adopts the NLRB's Statement of the Case as if fully set forth herein. (NLRB Br. 4-10.)

### **SUMMARY OF ARGUMENT**

Ozburn-Hessey Logistics, LLC, ("Company") admits that it has continuously refused to bargain with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("Union" or "USW") since the Union was certified as the exclusive bargaining representative of employees at the Company's facility in May 2013. Thus, the Board properly determined that the Company violated Sections 8(a)(1) and (5) of the Act, based on this refusal.

The Company asserts that its refusal to bargain with the Union is permissible because the Union should never have been certified as the bargaining representative. The Company bases this assertion on its arguments that the Board erred in ruling on an amended complaint, erred in counting the vote of Carolyn Jones, erred in sustaining the Union's challenges to the ballots of Tia Harris and Rachel Maxie-Chaisson, and erred in overruling the Company's election objections. However, the Company's arguments on each of these issues must fail.

First, the Company's argument that the Board lacked jurisdiction to rule on the amended complaint is utterly without merit. The Company bases this argument on its assertion that there exist two separate and distinct certifications in this case. However, the Board certified the Union in May 2013 and then, based on the *same* election and the *same* tally of votes, certified the Union in November 2014. The only reason a second certification exists is because of the intervening decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The facts underlying the amended complaint are substantively identical to the Union's unfair labor practice charge.

To the extent that the Company attempts to argue the merits of Carolyn Jones' discharge in this case, that argument is entirely misplaced. Jones' discharge is the subject of a related case which is currently pending before this Court. If the Court decides in the related case that Jones was unlawfully discharged, her vote will count, otherwise, if she is found to have been lawfully discharged, her vote

will not count. The Board did not err in counting Jones' ballot after the Board had found her discharge to be unlawful given the Board's interest in continuing to process representation cases even when those cases are pending review.

The Board acted well within its discretion in sustaining the Union's challenges to the ballots of Harris and Maxie-Chaisson. The actual job duties of both employees – which consist primarily of using a computer program to generate production reports for use by management, and which require them to spend very limited time interacting with production employees or working in the production area – establish that Harris and Maxie-Chaisson are office clerical employees. The Company has failed to meet its heavy burden of showing that the Board erred in determining that both disputed employees, as office clericals, should be excluded from the bargaining unit.

Lastly, the Board acted within its discretion in overruling the Company's election objections. This Court recognizes that the Board is far better equipped to determine whether activity by third party union supporters rendered a free and fair election impossible, and thus, the Board is afforded broad discretion in this area. The conduct the Company relies on in arguing that the election should be overturned consists of a few isolated, one-off comments by rank and file bargaining unit members, not Union agents. The Board reasonably found that the

employees' actions did not create a general atmosphere of fear among voters such that their free choice in the election was impossible.

The Board's certification of the Union and finding that the Company refused to bargain with the Union in violation of the Act should be upheld and the Board's Order should be enforced in its entirety.

## **ARGUMENT**

### **I. Standard of Review**

This Court reviews decisions of the Board deferentially and will uphold its legal determinations "so long as they are neither arbitrary nor inconsistent with established law." *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001). Further, the Court "will affirm the Board's decision to order collective bargaining in the face of objections to the Union's representation if the decision is reasonable and if the Board's underlying findings of fact are supported by substantial evidence on the record as a whole." *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999). *See also Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1564 (D.C. Cir. 1984) ("the scope of our review of the Board's decisions in cases involving certification is extremely limited."). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998)

(“[p]ut differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board’s conclusion.”). Thus, the Board’s reasonable inferences may not be displaced even though this Court might justifiably have reached a different conclusion based on *de novo* review. *See Universal Camera*, 340 U.S. at 488; *accord Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 837 (D.C. Cir. 2004) (“the court will uphold the Board’s decision upon substantial evidence even if we would reach a different result upon *de novo* review.”).

## **II. The Board Properly Ruled on an Amended Complaint**

On May 2, 2013, the Board issued a Decision and Order adopting the findings and recommendations of Administrative Law Judge Ringler (“ALJ”). (*See* A. 208-30.)<sup>1</sup> The decision concerned both representation issues, including the challenges to Tia Harris and Rachel Maxie-Chaisson’s ballots and the election objections raised in the Company’s brief to this Court, and unfair labor practice issues, including whether the termination of Carolyn Jones was unlawful, which has been fully briefed to this Court in a separate, related case. *Id.* Following a revised tally of ballots, the Board certified the Union as the collective bargaining representative. (A. 250, 232.) On July 16, 2013, the Union filed an unfair labor practice charge alleging that the Company was in violation of Sections 8(a)(1) and

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<sup>1</sup> “A” indicates references to the Deferred Appendix.

(5) of the Act by refusing to bargain with the Union. (A. 267.) The Acting General Counsel issued a complaint. (*Id.*; A. 233-36.)

Subsequently, the Supreme Court issued its decision in *Noel Canning*, 134 S. Ct. 2550. As a result of this decision, the Board set aside its May 2013 Decision and Order. (A. 267.) Then, on November 17, 2014, the Board issued a second Decision and Order in which it again adopted the ALJ's recommendations on both the unfair labor practice and representation issues. (*See* A. 250-52.) The certification, issued "[o]ut of an abundance of caution," was based on the 2013 revised tally of ballots, which the Board found accurately represented the election results. (A. 250.)

Following that decision, the Union again requested to bargain. On January 20, 2015, the Board gave the General Counsel leave to amend the complaint to include, *inter alia*, whether the Company agreed to bargain with the Union after its November 2014 certification. (A. 267, 253-55.) The amended complaint alleged that the Company refused to bargain, in violation of sections 8(a)(1) and (5) of the Act. (A. 267, 256-59.) The Company admitted that it continued to refuse to bargain with the Union, based on its position that the Board erred in resolving the ballot challenges and in overruling its election objections. (A. 267-68, 263-65.)

Now, the Company claims that the Board "had no jurisdiction" to issue its June 15, 2015, Decision and Order, which found that the Company failed and

refused to bargain with the Union – a factual finding which the Company readily admits. (Co. Br. 41-43.) The Company alleges that “there is no underlying unfair labor practice charge setting forth this allegation.” (*Id.* at 41.) However, as the Board found, “[t]he allegations in the amended complaint are part of a continuum of events that begin with the filing of a petition for a representation election . . . and culminate with the [Company’s] ongoing refusal to recognize and bargain with the Union . . . . These events are sufficiently related to the original charge in this matter to be included in the amended complaint.” (A. 268.) Further, “the Board specifically granted the General Counsel leave to file an amended complaint to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 17, 2014 certification of representative issued.” (*Id.*)

The Company cites *Payless Drug Stores*, in which the Board stated, “[i]n determining whether there is a sufficient nexus between the allegations in the charge and the complaint allegations, the Board examines, among other things, whether the two arise from the same factual circumstances and are based on the same legal theory.” *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994) (finding allegations arose from same factual circumstances because both based on the same letter). *See also Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944 (D.C. Cir. 1999) (amendment and initial complaint “closely related” when they “(1) involve the

same legal theory as allegations in the timely filed charges; (2) arise from the same factual circumstances; and (3) entail the same or similar defenses”).

The Company concedes that the allegations in the amended complaint are based on the same legal theory, but contends that they do not arise from the same factual circumstances asserting that they “involve two distinct and independent certifications.” (Co. Br. 42.) This is simply not true. As the procedural history above illustrates, the certifications are based on the *same* tally of ballots from the *same* election. As the Board noted in its most recent decision, “[a]ll representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.” (A. 268.) Further, the Board stated in its 2014 decision that “there is no question” that the initial certification was substantively correct. (A. 250.) The Board only issued a second certification “in an effort to avoid further litigation that would only serve to further delay this matter. . . .” (*Id.*) Unfortunately, the Company now relies on its entirely baseless argument to do just that.<sup>2</sup>

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<sup>2</sup> As the Board noted in its brief, the Company’s reliance on *McKenzie Engineering Corp.*, 326 NLRB 473, n.3 (1998) is misplaced as that case involved an attempt to amend a complaint to include an entirely new unfair labor practice allegation. (See NLRB Br. 32.)

### **III. Carolyn Jones' Vote Was Properly Counted**

The Company contends that Carolyn Jones was lawfully terminated, and therefore, her vote in the election should not count. (Co. Br. 27-38.) To the extent that the Company is attempting to argue the merits of Jones' discharge, that issue has been fully briefed and is currently awaiting argument before this Court. *See Ozburn-Hessey Logistics, Inc. v. NLRB*, Case Nos. 14-1253 and 14-1289 (D.C. Cir.). This Court's finding in that proceeding will determine whether Jones was unlawfully or lawfully terminated, and thus, whether her vote should count.

It was not improper, as the Company contends, for the Board to count her vote following the Board's finding that Jones was unlawfully terminated given, as the Board explains, its practice of continuing to process representation matters despite a pending petition for review. (*See* NLRB Br. 14.) Indeed, as the Company points out, it previously filed an emergency motion with this Court seeking an order preventing the Board from opening Jones' ballot, and that motion was denied. *See Ozburn-Hessey Logistics, Inc. v. NLRB*, Case No. 13-1170 (D.C. Cir.) (Doc. No. 1435999).

### **IV. The Board Acted Within Its Discretion in Sustaining Challenges to the Ballots of Rachel Maxie-Chaisson and Tia Harris**

Through a stipulated election agreement, the Union and the Company agreed that the bargaining unit would exclude "office clerical" employees. (A. 221.) The Board acted within its discretion when it sustained the Union's challenges to the

ballots of Tia Harris and Rachel Maxie-Chaisson based on the determination that both are “office clericals,” as opposed to “plant clericals.”

The long-recognized distinction between office and plant clericals is rooted in community-of-interest concepts. *Cook Composites & Polymers Co.*, 313 NLRB 1105, 1108 (1994) (internal citations omitted). *See also Power, Inc. v. NLRB*, 40 F.3d 409, 420 (D.C. Cir. 1994). This Court has held that what distinguishes office clericals from plant clericals, or production employees, is “the character of their work.” *Power, Inc.*, 40 F.3d at 421. As the Board has explained, “[c]lericals whose principal functions and duties relate to the general office operations and are performed within the general office itself, are office clericals who do not have a close community of interest with a production unit.” *Cook Composites & Polymers Co.*, 313 NLRB at 1108. This is in contrast to “plant clericals” who “perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.” *Caesar’s Tahoe*, 337 NLRB 1096, 1098 (2002), *quoting Gordonsville Indus.*, 252 NLRB 563, 591 (1980). Thus, generally, the duties of office clericals relate to general office operations, whereas the duties of plant clericals, or bargaining unit employees, are more closely aligned with the production process. *See, e.g., Gordonsville Indus.*, 252 NLRB at 591 (“an employee who works in the production area requisitioning parts needed by production employees is a plant clerical; an employee who fills out

forms in the billing department located in the administrative offices is an office clerical.”).

Recognizing the distinction between office and plant clericals, the ALJ, and subsequently the Board, found as follows:

[Harris and Maxie-Chaisson] work in a separate office area, and spend an extremely small percentage of their work time on the warehouse floor. They are data clerks, who mainly sit behind a computer, prepare productivity reports and perform accounts receivable work. Their reports are primarily used by management to gauge productivity and resource allocation. On some occasions, these reports can also be used to support a discipline, transfer or layoff.

(A. 227.) Based on these factors, the Board correctly determined that both Harris and Maxie-Chaisson are excluded office clerical employees.

*A. Harris and Maxie-Chaisson do not spend the majority of their time working in production areas.*

The Board rightly found that both employees “work in a separate office area, and spend an extremely small percentage of their work time on the warehouse floor.” (A. 227.) Harris testified that she spends most of her day working on a computer at a desk, which is located in an office. (A. 81-82.) Harris’ desk is directly adjacent to her manager, Buddy Lowery. (A. 90.) Maxie-Chaisson’s work station, until shortly before the second election, was located next to two supervisors, and she was not seen on the warehouse floor. (A. 40-41, 80.) This office area is secure and limited to access by other employees. (A. 21, 25, 44.)

The Company does not dispute the Board's finding that Harris and Maxie-Chaisson primarily work in an office separate from the production area. Rather, the Company contends that the Board erred in considering this factor because other employees who are included in the bargaining unit have access to this same office area. (*See* Co. Br. 24.) However, the Board's finding was not exclusively based on who has access to the office area, which includes both management and some bargaining unit employees. Rather, the Board considered the amount of time Harris and Maxie-Chaisson spend working in the production area, which is very little. (*See* A. 227 (“[t]hey work in a separate office area, *and spend an extremely small percentage of their work time on the warehouse floor.*”) (emphasis added).

Established case law makes it clear that the Board's consideration of this factor was entirely proper. *See Virginia Mfg.*, 311 NLRB 992, 992 (1993) (finding an employee to be office clerical despite spending “40 percent” of his work time on the production floor); *Cook Composites & Polymers Co.*, 313 NLRB at 1108 (finding employees to be excluded office clericals “even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel.”); *Container Research Corp.*, 188 NLRB 586, 587 (1971) (“[a]lthough the materials coordinator spends about 25 percent of her time in the production area and thus has daily contact with production and maintenance personnel, it appears that her principal functions and duties relate to the general

office operations and are performed within the general office itself.”); *Boeing Vertol Co.*, 233 NLRB 866, 868 (1977) (finding employees to be office clericals though they spent “a quarter or a third” of their working time in production areas); *see also Caesars Tahoe*, 337 NLRB at 1098 (“plant clericals spend *most* of their working time in the plant production area.”) (emphasis added).

While the Company contends that some bargaining unit positions – inventory control specialists, customer service representatives, and team leads – may have access to the office, the specific job duties of those positions are different from those of Harris and Maxie-Chaisson. The customer service representatives do not work with the Red Prairie program, which is both Harris and Maxie-Chaisson’s primary job duty. In fact, no other employees testified that they use the Red Prairie system as part of their regular job duties.

The Company asserts that Kaycee Harden, a customer service representative, uses the Red Prairie system. (Co. Br. 11-12.) But, in fact, Harden testified that she does *not* use Red Prairie. (A. 137.) Brenda Stewart, a team lead, testified that her job duties require her to go out in the warehouse and take product off of the shelves and process the product. (A. 105.) She also receives product that comes into her department, unloads it onto pallets, and processes it in the system. (A. 104.) Stewart also testified that she has a desk located in the middle of the warehouse floor, not in the office. (A. 106.) And lastly, the Board has found that

inventory control specialists, responsible for the maintenance of inventory necessary for the production process, share a community of interest with other bargaining unit employees. *See Kroger Co.*, 342 NLRB 202, 209-210 (2004).

*B. Harris and Maxie-Chaisson's specific job duties are those of office clericals.*

The Company asserts that typical plant clerical duties are timecard collection, transcription of sales order forms to facilitate production, maintenance of inventories, and ordering supplies. (Co. Br. 22-33.) Neither Harris nor Maxie-Chaisson perform any of these functions. Harris testified that her primary responsibility is administration of the Red Prairie computer program. (A. 84, 87, 89.) Likewise, Maxie-Chaisson's regular duties mainly involve the Red Prairie program, for which she is qualified as a "super user."<sup>3</sup> (A. 142-43.) Red Prairie is a sophisticated system, which is primarily used to prepare labor management reports for management use. (A. 84-85, 89.) Harris testified that she collects raw data from other computer sources, not directly from the production employees themselves, and enters it into the Red Prairie program. (A. 91, 97-98.) She also testified that it has taken her significant time and energy to learn how to use the Red Prairie system. (A. 100.)

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<sup>3</sup> The Company takes issue with the fact that the Board considered use of Red Prairie as a factor in determining whether to include Harris and Maxie-Chaisson in the unit. (Co. Br. 24.) However, these employees' actual job duties are to prepare reports through Red Prairie, and therefore, it is entirely relevant in deciding whether to include them in the bargaining unit.

The reports generated through Red Prairie assist management in determining how to run the warehouse as efficiently as possible, including determining staffing levels for the warehouse. (A. 85.) Most of the reports generated through Red Prairie go directly to management and are not seen by employees on the warehouse floor. (A. 98, 100-101.)

Maxie-Chaisson can access areas of the computer system only supervisors can access, and can change employees' passwords. (A. 31, 35-36, 147.) She also adjusts employees' starting and stop times in the Red Prairie system. (A. 43-44, 151-52.) She communicates with management at Memphis and Brentwood regarding productivity numbers and participates in management-level conference calls during which management discusses specific individuals who were underperforming. (A. 158-59.) Those employees in the bottom ten percent of productivity levels are considered to be underperforming and are required to undergo an observation and participate in a meeting with management. (A. 158, 160.) Maxie-Chaisson, using the Red Prairie system, prepares the reports for management to use in the meetings with these employees. (A. 161.) The production employees were aware that Maxie-Chaisson discussed productivity or performance levels with management. (A. 159.)

Maxie-Chaisson has the additional duties of discussing performance with employees and explaining ways they could improve their productivity. (A. 32-33,

144, 148-49.) Bargaining unit employees testified that they understood they could be disciplined if they did not follow Maxie-Chaisson's instructions regarding production levels. (A. 41, 43, 45.)

Harris also testified that billing responsibilities – which have a direct impact on the operational budget of the facility – are an important part of her job. (A. 86-88.) *See Dunham's Athleisure Corp.*, 311 NLRB 175, 176 (1993) (typical office clerical duties are billing, payroll, phone and mail). She creates account invoices using another computer program, Accuplus. (A. 93-94.)

The Company contends that Maxie-Chaisson and Harris' job duties overlap with those of bargaining unit members. The Company bases this on evidence that Maxie-Chaisson once "filled in" for a customer service representative and performed a part of her job for approximately a week. (Co. Br. 10, *citing* A. 154; Co. Br. 12, *citing* A. 49-50.) Further, Harris testified that she *may* do blasting work on the warehouse floor "once or twice a month" at the request of management. (A. 96.) However, as the case law illustrates, even when employees spend some portion of their time working in the production area they are not considered plant clericals if their primary job duties are distinct from that of the production employees. *See Virginia Mfg.*, 311 NLRB at 992; *Cook Composites & Polymers Co.*, 313 NLRB at 1108; *Container Research Corp.*, 188 NLRB at 587; *Boeing Vertol Co.*, 233 NLRB at 868.

Importantly, administrative assistants, such as Harris and Maxie-Chaisson, were not eligible to vote in a prior election involving the same unit. (A. 227, 97, 108-112.)

*Mitchellace, Inc.*, cited by the ALJ, involved “data entry clerks responsible for entering production data into computers,” which “generate[d] production reports which are used to track productivity.” *Mitchellace, Inc.*, 314 NLRB 536, 536 (1994). The Board found that these employees were excluded office clericals. *Id.* at 537. *See also Virginia Mfg.*, 311 NLRB at 992 (finding employee to be office clerical when “primary job function” is to “compile production information” and to prepare a report “used by management to determine daily production priorities”). The Company attempts to distinguish *Mitchellace* because some factors addressed in that case’s community of interest analyses differ from the instant challenges. However, the community of interest test involves a totality of circumstances analysis, and therefore, there will always be facts differing from one case to another. But, the record is clear that Harris and Maxie-Chaisson perform job functions related to general office operations, and are therefore office clerical employees.

The Company cites to this Court's decision in *Avecor*, and asks the Court to take the "same action" as it did in that case.<sup>4</sup> (Co. Br. 26, *citing Avecor, Inc. v. NLRB*, 931 F.2d 924, 933 (D.C. Cir. 1991).) However, the circumstance in *Avecor* was that *Columbia Textile Services*, 293 NLRB 1034 (1989) was decided while the administrative law judge's decision was awaiting review by the Board, and the Court took issue with that fact that the Board did not explain that "*intervening Board precedent*" when that intervening decision was in "tension" with the Board's decision. *Avecor*, 931 F.2d at 933 (emphasis added). Thus, the Court remanded and instructed the Board to address *Columbia Textile*. *Id.* There is simply no intervening precedent in the instant case.

Further, on remand, the Board in *Avecor* again found that the disputed employees should be excluded from the bargaining unit as office clericals based on several factors, including the fact that their job duties were similar to those "typically accomplished by office clerical employees, such as preparing shipping papers" and "doing typing," which the Board found to be "incidental to, and not an integral part of, the production process." *Avecor, Inc.*, 309 NLRB 73, 75 (1992).

The Board also found that the disputed employees had "limited contact with

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<sup>4</sup> The Company also relies on *Hamilton Halter Co.*, 270 NLRB 331 (1984) and *Kroger Co.*, 342 NLRB 202 (2004). (Co. Br. 25-26.) As the Board noted in its brief, those cases are also distinguishable because in both cases the Board found that the job duties of the disputed employees were closely associated with or integral to the production process, which is not the case here. (*See* NLRB Br. 21-23.)

production employees,” consisting mostly of “taking paperwork into the production area about four or five times a day.” *Id.*

The Board in *Avecor* distinguished *Columbia Textile* because, in that case, the disputed employees “had more than minimal contact with the unit employees” and “their job duties were functionally integrated into the production process.” *Avecor*, 309 NLRB at 75. In *Columbia Textile*, the disputed employees’ job functions included filling customer orders, assisting production employees with filling customer orders, and working with production to change customer orders. *Columbia Textile Servs.*, 293 NLRB at 1038. On the other hand, here, Harris and Maxie-Chaissons’ primary job functions are not integrated into the production process itself. Rather, they spend most of their time entering production data into the Red Prairie system for use by management to determine how to run the warehouse most efficiently. The Company asserts that Harris and Maxie-Chaissons’ jobs are “directly tied to the production process, since there would be no productivity data to enter and no invoices to generate, if it were not for the work of the unit employees.” (Co. Br. 23-24.) However, the same could be said for every management employee in the facility – there would be no employees to supervise if not for the work of the unit employees.

Based on the foregoing, the Board’s decision sustaining the Union’s challenges to Harris and Maxie-Chaisson’s ballots should be upheld.

## **V. The Company's Objections to the Election were Properly Overruled**

In determining whether to set aside an election, “[t]he Board must determine whether the challenged conduct tended to interfere with employees’ free exercise of the franchise.” *Family Serv. Agency San Francisco*, 163 F.3d at 1377, citing *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1562. This Court has held that “[a] hearing officer is far better situated than are we to draw conclusions about a matter as ephemeral as the emotional climate of the workplace at the time of the election.” *Family Serv. Agency San Francisco*, 163 F.3d at 1377 (internal citations omitted). Thus, the Board is afforded broad discretion in making this determination, and the Court will overturn the Board’s decision to certify a bargaining unit “only where the activities of union supporters created an atmosphere of fear and coercion which made a free and fair election impossible.” *Id.* The burden is on the Company “to establish that the election was not fairly conducted.” *Id.*

While the Board has held that an election should be conducted in “laboratory conditions,” this Court recognizes that this standard must be applied “flexibly, for in its extreme form it is a standard that no seasoned observer considers realistic.” *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1562 (internal citations omitted). The Board is best suited to make the “delicate policy

judgments” necessary to determine “when laboratory conditions have sufficiently deteriorated to require a rerun election.” *Id.* at 1562.

Under longstanding precedent, the Board will set aside an election based on the conduct of third parties if the conduct creates a general atmosphere of fear and reprisal that renders a fair election impossible.<sup>5</sup> *Accubilt, Inc.*, 340 NLRB 1337, 1337 (2003); *citing Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In determining whether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner:

the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was “rejuvenated” at or near the time of the election.

*Westwood Horizons Hotel*, 270 NLRB at 803 (internal citations omitted).

The alleged incidents of objectionable Union conduct do not meet this standard.

The Company alleges that Keith Hughes, a rank-and-file bargaining unit member, threatened Dawn Barnhill, who was wearing a t-shirt opposing the Union, by telling her “I’ll rip that shirt off of you.” (Co. Br. 39, *citing* A. 115.) True or not, this isolated statement, made by a fellow employee (not a Union agent) outside the hearing of others, is not sufficiently serious or likely to intimidate voters in the

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<sup>5</sup> The individuals the Company claims made threatening comments were pro-Union employees, not Union representatives or agents.

bargaining unit to affect the outcome of the election. As this Court has explained, “it is well settled that employees are less likely to be coerced by the conduct of fellow employees” because they have the ability, “from experience in the workplace, to give appropriate weight to possibly impulsive statements of fellow employees in the heat of a campaign.” *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1565. Moreover, the Board found no evidence that Hughes’ comment was adopted by the Union or disseminated in a manner that would affect the election. Indeed, no other employees witnessed the interaction. (A. 115, 117.)

In addition, Hughes was overheard telling Michael Guy, a fellow bargaining unit member, that during a captive audience meeting Randall Coleman, a management employee, insinuated a connection between union adherents and violence. (A. 126-28.) The Company argues that this comment was “inflammatory” and “prejudicial.” (Co. Br. 40.) However, as the Board found, Operations Manager James Cousino testified that Coleman did, in fact, read a newspaper article at the captive audience describing “violen[t] activity” during a labor dispute involving the USW at a different location. (A. 224, 129-30, 133.) That newspaper article referred to the union supporters as “thugs, gangbangers, and killers.” (A. 133.) As the Board properly determined, Hughes’ comment was “reasonable” and “responded to an article raised by Coleman.” (A. 224.) *See Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1564-65 (finding

that a conversation amongst pro-union employees concerning violent activity did not taint the election atmosphere when the employer initially raised the issue of violence on union picket lines).

With regard to the allegation that the Union distributed campaign literature that appealed to violence and racial prejudice, the Board correctly found that the document (R. Ex. 20) the Company argues is objectionable was not entered into evidence or authenticated at the hearing as a Union-generated document. (A. 48, 61-62.) Thus, the Company “wholly failed to substantiate this allegation.” (A. 224.) *See Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1568 (“ordering a rerun election on the basis of anonymous incidents can be devastatingly unfair to the majority of employees who have voted for the union; an unscrupulous employer could encourage anonymous pro-union incidents in order to give it grounds for use later to reverse the election result if it loses.”).

Finally, the Board correctly found that the only evidence of electioneering occurred *after* the vote in dispute. (A. 224.) The only evidence concerning this objection was testimony from Bobby Hill. Hill, an observer appointed by the Company, allegedly saw an employee give a high five to a Union observer and heard the Union observer say, “you did the right thing,” back to the voter *after* the voter had submitted his ballot. (A. 123-24.) The exchange took place in the parking lot outside the polling place. (A. 123.) Nobody else could hear them. (A.

124-25.) Nothing about the exchange interfered with any voters' free choice in the election. *See U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004) (overruling the employer's contention that a union observer engaged in objectionable electioneering by giving a "thumbs up" to employees); *see also Family Serv. Agency San Francisco*, 163 F.3d at 1376, 1382 (upholding Board's decision not to overturn election despite electioneering objections alleging that multiple union supporters spoke to voters as they entered and exited the polling place because activity did not "substantially impair employees' ability to exercise free will at the ballot box.").

As this Court has explained, "we are disinclined to second-guess the Board when it makes the kinds of 'totality of the circumstances' and balancing judgments required in this kind of case," and therefore, "review is narrow: if the Board has followed fair procedures, has evaluated the evidence on the basis of the kinds of reasonable rules discussed above, and has reached a conclusion that is reasonable given that evaluation, we may not substitute our judgment as to the ultimate result for that of the Board." *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1569-70. "In particular, we will not independently assess the 'totality of the circumstances' to overturn the Board's considered decisions." *Id.* at 1570.

Based on the foregoing, the Board's decision to overturn the Company's election objections should be upheld.

**CONCLUSION**

The Union respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Date: January 21, 2016

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. Rule 32, the undersigned counsel for Intervenor certifies that the foregoing Brief of Intervenor complies with the type-volume and typeface requirements of Fed. R. App. P. 32(a)(7)(B) and 32(a)(5-6).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,733 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font on Microsoft® Word 2010.

Dated: January 21, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I also certify that the following were also served via U. S. mail, postage prepaid, to the addresses described below:

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